United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-6159

United States Court of Appeals

For the Second Circuit.

HELEN D. KELLEY and JOHN E. KELLEY,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA and RUTH SEMKO,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

Brief for the Plaintiffs-Appellees, Helen D. Kelley and John E. Kelley.

DONALD W. KRAMER
KRAMER, WALES & MCAVOY
Attorneys for Plaintiffs-Appellees
59-61 Court Street
Binghamton, N. Y. 13901
(607) 723-6321

THE REPORTER COMPANY, INC., Walton, N. Y. 13856—607 865-4131—1977

Table of Contents.

Page

Questions Presented 1

Statement 2

Facts 5

Law:

Point I. The United States has accepted liability for the negligence of its employee, Francis Hunt, in the operation of his motor vehicle. It has also accepted liability for the negligent failure of its employee, Francis Hunt, to comply with the requirements of U. S. Code 2679(c) and the United States is bound by his negligent failure to comply with that requirement 11

Point II. The Court in any event had jurisdiction of the defendant, Ruth Semko, and her cross-claim against the defendant Hunt and the United States of America. Consequently, the United States cannot succeed in this appeal 13

Point III. Under the peculiar facts of this case, U.S.C 2401, 2675 and 2679 provide no basis for the reversal of the judgment appealed from 15

Conclusion. The judgment should be affirmed 33

Appendix 35

CITATIONS.

CASES:

	Page
Avril v. United States, 461 Fed. 2d 1090	27
Baker v. United States, 341 F. Supp. 494(d), aff'd C. A. No. 72-1708 (Addendum to Appellant's Brief 8a)	27
Beavers v. U. S., 291 F. Supp. 856	24
Bernard v. U. S. Lines, Incorporated, 475 F. 2d 1134	27
Bialowas v. United States, 443 F. 2d 1047	27
Binn v. United States, 389 F. Supp. 988	29
Carr v. United States, 422 F. 2d 1007	25
Corniel-Rodriquez v. Immigration and Naturalization Service, 532 F. 2d 301	21, 22, 32
Driggers v. United States, 309 F. Supp. 1377	24
John P. Elter v. United States, pp. 16a-20a of Addendum to Appellant's Brief	28
Goldberg v. Casper Weinberger, Secretary of Health, Education and Welfare, pp. 1a-7a (Addendum to Appellant's Brief)	22
Jeannette Grix v. United States, pp. 21a-23a (Addendum to Appellant's Brief)	28
Gunstream v. United States, 307 F. Supp. 366	27
Gustafson v. Peck, 216 F. Supp. 370	27

Page

Henning v. Ebersole, Supreme Court, New York State, 8 Misc. 2d 768 20

Hoch v. Carter, 242 F. Supp. 863 26

Sulo Kangas v. United States and Armin Reinhard Steinhaus, pp. 11a-15a of Appellant's Brief 23, 28

Lu You Fee v. Dulles, 236 F. 2d 885, 887 32

Massaglia v. C.I.R., 286 F. 2d 258 ..... 23, 32

Meeker v. United States, 435 F. 2d 1219 25

Melo v. United States, 505 F. 2d 1026 29

Moser v. United States, 341 U. S. 41 (1959) 32

Noga v. United States, 411 F. 2d 943 27

Perez v. United States, 218 F. Supp. 571 27

Peterson v. United States, 428 F. 2d 368 27

Podea v. Atcheson, 179 F. 2d 306 32

Rivoli Trucking Corp. v. Amer. Export Lines (Supreme Court, New York), 17 Misc. 2d 569 20

Rosario v. American Export-Isbrandtsen Lines, Inc., 395 F. Supp. 1192 14

Staley v. United States, 306 F. Supp. 521 25

United Fruit Co. v. United States, 168 F. Supp. 549 ..... 23, 32

Page

STATUTES:

Federal Tort Claims Act:

28 U.S.C. 1292(b) 4
28 U.S.C. 1346(b) 17, 30
28 U.S.C. 2401(b) 4, 12, 15, 25, 27, 30
28 U.S.C. 2675(a) 4, 12, 14, 15, 25, 30, 31
28 U.S.C. 2679 ..... 4, 15
28 U.S.C. 2679(b) 30
28 U.S.C. 2679(c) 11, 15, 17, 24, 30
28 U.S.C. 2679(d) 4, 15

New York Civil Practice Law and Rules 3018 18
New York Civil Practice Law and Rules 2311 19

United States Court of Appeals

FOR THE SECOND CIRCUIT.

HELEN D. KELLEY and JOHN E. KELLEY,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA and RUTH SEMKO,

Defendants-Appellants.

BRIEF FOR PLAINTIFFS-APPELLEES.

Questions Presented.

1. May the United States Government completely ignore the statutory procedures of the removal of cases involving government employees from the State Court to the Federal Court until more than two years have elapsed from the date of an accident, and having done so, deprive innocent injured parties of their established remedy by asserting a lack of jurisdiction?

2. Can government employees and an insurance carrier insuring a government employee contrive to conceal the interest of the United States Government in a State Court proceeding until a statute of limitations has run and by so doing, destroy the just remedies afforded to the injured parties by the United States District Court?

3. Is every accidentally injured person required to file a claim against the United States Government following an accident because the person causing such injury might in some way be claimed to be an employee of the United States Government in the course of his employment?

Statement.

The United States appeals from a judgment granted after a trial before Honorable Edmund Port of the United States District Court for the Northern District of New York awarding the plaintiff, Helen D. Kelley Fifty Thousand Dollars ($50,000) and the plaintiff, John E. Kelley, Fifteen Thousand Dollars ($15,000) damages for injuries sustained by the plaintiff, Helen D. Kelley, in an accident which occurred on November 8, 1972 on the public highway near Binghamton. At that time, she was struck by a car operated by Francis A. Hunt and owned by Francis A. Hunt which had just passed a vehicle driven by the defendant, Ruth Semko. At the trial, the negligence of the defendant, Francis Hunt, the driver of the car and of the defendant, Ruth Semko, was clearly established and the Court found each defendant 50% responsible for the damages resulting from the accident.

The action was commenced in the Supreme Court of the State of New York in Broome County on May 21, 1973 against Francis A. Hunt, the driver and owner of one car and Ruth Semko, the driver and owner of the second car. Francis A. Hunt, as has been subsequently developed, was, at the time, an employee of the United States Government and was proceeding to his residence after having completed his work.

The defendant, Ruth Semko was uninsured. The defendant, Francis A. Hunt, was insured by the Travelers Insurance Company. The law firm of Hinman, Howard & Kattell, through Theodore Sommer, appeared and answered on behalf of Mr. Hunt, raising no question of the jurisdiction of the Court of the subject matter or of the person of the defendant, Francis Hunt. The defendant, Ruth Semko, appeared through Robert C. Powers,

an attorney of Binghamton, N. Y. and answered the complaint. The case continued its normal course in the Supreme Court in Broome County and was about to be reached for trial in December of 1974 when the claim was made for the first time by the attorneys for Francis Hunt that he was a government employee in the course of his employment at the time of the accident and hence the case was one required to be conducted in the United States Court against the United States of America. This was approximately one month more than two years following the date of the accident. It was the first indication to the plaintiffs and their counsel that Mr. Hunt could possibly have been in the course of his employment at the time of the accident.

Mr. Hunt and Mr. Ricks, a government investigator referred to in the brief of the appellant and the plaintiffs have all testified in the matter before Judge Port and any questions of fact or uncertainties which might have existed at the time of the motion before Judge McMahon have been resolved in favor of Mr. and Mrs. Kelley, the plaintiffs. There is no claim that the findings of Judge Port were contrary to the evidence.

At an Examination Before Trial of Francis Hunt on March 5, 1974, it did develop that Mr. Hunt was employed by the United States Department of Agriculture and he had left work at Friendsville, Pa. about four o'clock on the day of the accident and was on his way to his residence at the time of the accident. Nothing was developed to indicate the essential fact that Francis Hunt was in the course of his employment while traveling to his home.

On December 9, 1974, Mr. Hunt received a call from Mr. Merwin Kaye of the Research and Operations Division of the Office of the General Counsel in Washing-

ton, D. C., asking him to send a telegram to the Government, asking the United States Government to defend him pursuant to 28 U. S. Code §2679 (65). This was the first action injecting the United States Government into the matter and it came from the Research and Operations Division of the Office of the General Counsel in Washington, D. C. Correspondence from plaintiffs' counsel to the Government and to the United States Attorneys for the Northern District of New York dated December 9, 1974 (67-68) was the result of the call received from Mr. Merwin Kaye. These actions occurred as the case in the Supreme Court in Broome County was to be reached for trial.

Subsequently, a formal motion was made to move the case to the United States District Court in the Northern District of New York and that motion was granted. The plaintiffs thereupon filed an administrative claim with the United States Government on May 1, 1975 which was denied on May 14, 1975 as being filed untimely.

Then on June 9, 1975, the United States moved to be substituted as a party defendant pursuant to 28 U.S.C. 2679(d) and to dismiss the action as barred by 28 U.S.C. 2675(a) and 28 U.S.C. 2401(b). This motion was granted insofar as it was for substitution of the United States Government as a defendant and denied insofar as it moved to dismiss the plaintiffs' action.

The Court's decision (98) certified the case for immediate appeal under 28 U.S.C. 1292(b) and directed a stay of all proceedings pending the determination of the appeal or denial of permission to appeal by the Court of Appeals. This was clearly a case which was appropriate for such an appeal. The Government, however, did not seek permission to appeal and elected to proceed with the case for trial.

The case then came on for trial before Honorable Edmund Port at the City of Auburn, beginning on June 1st and terminating on June 4th. Judge Port heard the evidence of all parties, including testimony from Francis A. Hunt, the government employee and David Ricks, the government investigator referred to in the motion papers and upon all the evidence granted judgment in favor of the plaintiffs-appellees against the defendants, United States of America and Ruth Semko. Judgment was entered thereon and it is from that judgment and decision of Judge Port that this appeal is taken.

Facts.

On November 8, 1972 the plaintiff, Helen Kelley, was walking south along the east side of the road known as Upper Park Avenue, south of Binghamton, in Broome County, New York near her home. She was alone, walking facing traffic. As she approached a crest where the road dipped into a fairly sharp decline, a car driven by the defendant, Ruth Semko, passed her going south. It was partly over the center of the two-lane highway. As the Semko car passed the plaintiff, Helen Kelley, a vehicle driven by Francis Hunt coming from the opposite direction came over the crest in the road, skidded for a substantial distance and struck the plaintiff as she was trying to get up a bank on the east side of the road to avoid being struck. The Hunt car continued some distance skidding and finally stopped facing north on the west side of the road. There was ample evidence that Hunt was driving too fast for conditions and did not have reasonable control of his vehicle. The plaintiff, Helen Kelley, suffered severe fractures of the femur in both legs and extreme damage to the ligaments and tendons, particularly in the area of each knee, in addition to general bruises and contusions. She has a degree of

permanent disability in spite of great efforts to rehabilitate herself. No one has denied the extent of her injuries or the disabling nature. Judge Port, having seen and heard the witnesses, characterized her as follows:

> "Towards the end of her hospitalization, she suffered a period of anxiety and depression, although throughout most of her hospitalization she demonstrated great courage and determination to effect a recovery and a resumption of normal activities as far as could possibly be achieved. * * * Her efforts have been conscientious in connection with exercise. A failure to exercise would, I am sure, result in a deterioration of her condition. She scrupulously adheres to a regimen of exercise to maintain her limbs in as good condition as possible" (Opinion of Judge Port pp. 11 and 12 Appellees' Appendix annexed hereto).

On the entire record, including the record of the Motion before Judge McMahon, Judge Port found both defendants equally negligent and awarded Helen Kelley Fifty Thousand Dollars ($50,000) damages, and John Kelley, her husband, Fifteen Thousand Dollars ($15,000) for expenses and loss of services.

Since the only question raised on this appeal is one of jurisdiction of the United States District Court to hear and determine the action on its merits, the proceedings following the accident and prior to the trial become important.

Francis Hunt, the original defendant in the action in State Court, the government employee involved, was driving his own car on his way home from Pennsylvania where he had been working that day. He left work at 4:00 p.m. and proceeded toward Binghamton to his residence. There are no markings of any kind on his vehicle

or otherwise indicating his employment by the government and the accident report made no reference to his employer or to his employment. Being both owner and driver, he was apparently the only person responsible for the operation of his vehicle. Mr. Hunt wrote a letter after the motion was made to substitute the United States as a defendant and to dismiss the action, which is unverified and in which he refers to visiting the plaintiffs, Helen Kelley and John Kelley at the hospital, and says he told them of the facts of his employment. However, Mr. and Mrs. Kelley had no recollection of this visit, and in their affidavits and testimony indicated they had no knowledge regarding Mr. Hunt's employment. On this record there is no evidence credited by the Court that he made such a visit or conveyed any information to the plaintiffs with respect to his employment.

It is claimed that at some point early in the plaintiff, Helen Kelley's convalescence, a David Ricks claimed to have visited Mrs. Kelley and to have written out a statement which she did not sign. Mrs. Kelley had no recollection of Mr. Ricks being there nor did the plaintiff, John Kelley. The government's file contained an unsigned statement which Mr. Ricks claimed to have taken from Mrs. Kelley. Mr. Ricks also testified at the trial and the credibility of his testimony was passed on by the trial judge.

The government had at some time obtained a copy of a hospital bill of Mrs. Kelley and a surgeon's report which were attached to the government's papers on the motion to dismiss. However, there is evidence (Appendix 22) that Mr. Hunt talked with a representative of the government (OIG), presumably Mr. Ricks, and that this representative had conferred with representatives of the Travelers Insurance Company, including a Mr. Koons.

Mr. Ricks also testified at the trial. His testimony was obviously discredited by Judge Port. In fact, it is entirely likely that the medical bill and information came to the government from the Travelers Insurance Company. Insofar as both Mr. Hunt and Mr. Ricks are concerned, they both testified at the trial and their credibility was a question for the Judge to decide.

The plaintiff retained this firm, Kramer, Wales & McAvoy and on or about May 21, 1973 an action was brought in the Supreme Court of the State of New York in Broome County seeking $150,000 in damages from Francis Hunt and Ruth Semko. The defendant, Francis Hunt, was insured for only $10,000 and the defendant, Ruth Semko, uninsured. Though he claims to have told the plaintiff that the government would take care of any claim, and had been told by his superior, Mr. Rainors, to report all developments to him, he claims not to have notified the government of the action brought against him. This claim is made in the face of the fact that he was uninsured to the extent of $140,000 of the claim which was made against him.

He did, however, notify the Travelers Insurance Company which had already had contact with the government through a Mr. Koons, if not otherwise, regarding the claim (Appendix 22). The Travelers Insurance Company retained the law firm of Hinman, Howard & Kattell, a very prestigious law firm, to represent the defendant, Francis Hunt. Theodore Sommer, of that firm, was mainly responsible for the defense. Mr. Hunt claimed to have explained everything to Mr. Sommer concerning his situation and to have been assured by Mr. Sommer that everything would be handled correctly (Appendix 22).

An Answer was filed on behalf of Mr. Hunt in the action against him and no question of jurisdiction over him or over the cause of action set forth was raised. These defenses were required to be raised by Motion or by Answer under New York law and are waived under that law by failure to assert them by motion or by Answer. It was clear that the Courts of the State of New York had jurisdiction.

There was no Motion by the government to intervene in any way. After some procedural delays occasioned by the absence of insurance on the co-defendant, Ruth Semko, an Examination Before Trial of Mr. Francis Hunt was held on March 5, 1974. Hunt testified that he was employed by the United States Government, Department of Agriculture, that he had left work in Pennsylvania at about 4:00 p.m. on the day of the accident and was on his way to his residence when the accident happened. Consequently, it appeared that he was not engaged in his employment at the time of the accident but was on his way home after work. The attorneys for the plaintiffs were aware of the provisions of the United States Code, 1346, 2401, 2675 and 2679 requiring the filing of a claim and action on that claim by the government before the commencement of an action against the government in tort and requiring that all process including complaints in negligence served on a government employee to be forwarded to the appropriate government officials and to the United States Attorney in the area involved, whose responsibility it became to remove the case to Federal Court and to defend it. The action against Francis Hunt had been pending in the Courts of the State of New York for nearly a year and neither by Motion nor Answer was any question raised of the jurisdiction of the Court over Francis Hunt or the cause of action stated against him. Not only was there no indication from the testimony of Francis Hunt that he was in the course of his employment for the

government at the time of the accident, but there had also been a complete failure to act on the part of the United States Government and the attorneys representing Francis Hunt in the State Court in the manner required by the Federal and State Statutes, if such were the case.

The action in the Supreme Court of Broome County continued its regular course. It would have been reached for trial in October, 1974 except for a temporary disability of the counsel for Ruth Semko. This would have preceded the running of the statute of limitations and would have precipitated action by the government at that time. The case was called for trial at the beginning of the December Term of Supreme Court in Broome County on or about December 8th, one month more than two years after the accident. The counsel for the defendant, Francis Hunt, raised the question of the United States Government's responsibility for the first time in open court upon a call of the Calendar. Consequently, the case was held and not tried, pending the determination of the interest of the United States of America. The United States has claimed that its first knowledge of the action in the State Court came from Mr. Hunt and his attorneys in the State Court action on December 9th. This is obviously not true. The letter of Mr. Theodore Sommer dated December 10, 1974 to the attorneys for the plaintiffs states as follows:

> "Mr. Hunt received a call from a Mr. Merwin Kaye of the Research and Operations Division of the Office of General Counsel in Washington, D. C. asking him to send a telegram to the government asking the United States Government to defend him pursuant to 28 U. S. Code §2679. A telegram to that effect was sent yesterday."

It is clear, therefore, that the government knew of the existence of this lawsuit and of its status on the Calendar before any telegram was sent by Mr. Hunt in December of 1974 and before any letters written by Mr. Sommer to the various government agencies in December, 1974. Since nothing had been done by the plaintiffs bringing the matter to the attention of the government, the only reasonable conclusion is that the government had knowledge of the existence of the Supreme Court action long prior to December, 1974 and did nothing. The inference is clear that either the defendant, Francis Hunt, or the Travelers Insurance Company which had the burden of his defense in an action seeking $150,000 damages kept the government informed through some channel of the status of the cause of action against Mr. Hunt in Broome County.

LAW.

POINT I.

The United States has accepted liability for the negligence of its employee, Francis Hunt in the operation of his motor vehicle. It has also accepted liability for the negligent failure of its employee, Francis Hunt, to comply with the requirements of U. S. Code 2679(c) and the United States is bound by his negligent failure to comply with that requirement.

The trial of the action on its merits before Judge Port established the negligence of Francis A. Hunt and the damages to the plaintiffs resulting from that negligence. The Opinions of Judge Port and Judge McMahon have correctly determined that the United States has accepted that liability. The government's claim on this appeal is

that the failure of the plaintiffs to file an administrative claim pursuant to U. S. Code 2675 and to commence an action against the United States within two years of the date of the accident as required by U. S. Code 2401(b) has deprived the Court of the jurisdiction to render the judgment which has been rendered.

It has been amply demonstrated in the prior proceedings on the Motion before Judge McMahon and at the trial that the failure of Francis Hunt to deliver to the Federal Government Agency the Summons and Complaint served upon him in the Supreme Court of the State of New York by the plaintiffs prevented the assertion by the United States of its jurisdiction within a reasonable time. Consequently, the plaintiffs have been deprived of the opportunity to file their administrative claim and to commence their action against the United States Government directly within all of the applicable statutes of limitation. The damages to the plaintiffs flowing from the original negligent act of Francis Hunt have been established in the amount of $65,000 after the trial before Judge Port. These same damages flow indisputably from the negligent failure of Francis Hunt to deliver to his superiors the Summons and Complaint in this matter served on him on or about May 13, 1973.

The facts set forth above in this Brief indicate very clearly that the failure of the United States to take action on the pending litigation in the Supreme Court of the State of New York within a reasonable time was the sole basis upon which the plaintiffs deferred the filing of an administrative claim and the institution of an action directly against the United States of America. Had appropriate action been taken the action promptly instituted in the State Court on behalf of the plaintiffs might have been dismissed as premature, but appropriate claim under Section 2401(b) U.S.C.A. would have been filed and lacking settlement, the action instituted directly against the United

States. In that event, the trial which has now been held and established the damages to the plaintiffs would have been held after the filing of an administrative claim and the resulting damages would have been the same.

Much has been written in the earlier Briefs in this matter on the question of whether the government can be subject to estoppel. In the view of the matter argued here, the question of estoppel is not relevant. The plain fact is that the United States has accepted liability for damages flowing from the negligent acts of its agents in the course of their employment. It was the duty of Mr. Hunt in the course of his employment to transmit to his superiors in the government the pleadings served upon him in the State Court action. His failure to do so was negligent, and that negligence has subjected the plaintiffs to the burden of unnecessary motions and to the risk of a trial at which their action might have been dismissed but properly was not. As a result, their damages have been fixed at $65,000. There is no basis at this time for rejecting the award of those damages.

POINT II.

The Court in any event had jurisdiction of the defendant, Ruth Semko, and her cross-claim against the defendant Hunt and the United States of America. Consequently, the United States cannot succeed in this appeal.

As we have pointed out earlier, the defendant, Ruth Semko, was uninsured and counsel who represented her at the trial have not participated in this appeal. Nevertheless, under the plain language of the statute this Court had jurisdiction of Ruth Semko and of the crossclaim filed

on her behalf against the United States. Section 2675 U.S.C. provides as follows:

> "(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make a final disposition of a claim within six months after it is filed shall, at the option of the claimant at any time thereof, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure, (Rule, Part I) by Third-party Complaint, crossclaim, or counterclaim."

The plaintiffs have beyond question a valid judgment against the defendant, Ruth Semko. Under the provisions of U. S. Code just quoted Ruth Semko has a valid judgment over against the United States of America for one-half at least of the amount of the judgment, even if the United States is not otherwise liable. *Rosario v. American Export-Isbrandtsen Lines, Inc.*, 395 Fed. Supp. 1992. Under the law of the State of New York which applies in this situation each judgment debtor is liable for the entire judgment and may obtain contribution up to one-half of the judgment from the other joint tort feasor. The reversal of the judgment against the United States of America at this juncture would leave the defendant, Ruth Semko, liable for the entire judgment with a right to recover one-half of that amount from the United States Government.

The United States has asserted jurisdiction in this matter, including the jurisdiction of the United States Courts over the action of the plaintiffs against Ruth Semko and the Cross-Complaint of Ruth Semko against the United States of America. Under these circumstances, there is no foundation for the reversal of the judgment rendered in that action where such judgment includes properly a judgment for the total damages sustained against both United States and Ruth Semko and a judgment against the United States requiring indemnity of Ruth Semko for one-half of the judgment rendered. We have found no case dealing with this precise situation. It is submitted, however, that under the peculiar facts of this case U.S.C.A. 2675 does not deprive the District Court or this Court of jurisdiction to render the judgment which has been rendered.

POINT III.

Under the peculiar facts of this case, U.S.C. 2401, 2675 and 2679 provide no basis for the reversal of the judgment appealed from.

At the outset, the Court should consider that Judge McMahon, in refusing to dismiss the action of the plaintiffs, certified the case for immediate appeal (Appendix 98) and stayed all proceedings pending an application by the government to this Court for permission to appeal. This was clearly a case in which such an appeal would have been allowed by this Court in order to expedite the termination of litigation if the appeal should be successful. The government, however, refused to file a petition for immediate appeal for the unimpressive reasons stated in the government's brief. The litigation continued to a full trial before Judge Port at Auburn, N. Y. on June 1, 1976, resulting in the decision and judgment which is here appealed from. Since the Order of Judge McMahon is not

a final Order appealable as of right, the appellant may raise on the appeal from the final judgment the question of jurisdiction which was preliminarily decided by Judge McMahon and finally decided by Judge Port, awarding judgment to the plaintiffs in June of 1976. However, the question is raised now not solely on the papers submitted before Judge McMahon on the Motion before him, but upon the entire record, including the evidence offered before Judge Port. The appellant at this point would obviously prefer to have the appeal treated in this Court as if it were in fact a direct appeal from the decision of Judge McMahon. For that reason, the appellant has not reproduced in full or in part the evidence taken before Judge Port upon which his decision rests. The respondents' Appendix attached to this Brief contains the full decision of Judge Port in which he clearly rejects the contentions advanced with respect to jurisdiction. It is respectfully submitted that the appellant has failed to supply this Court with any record or evidence upon which the decision of Judge Port may be reversed.

The analysis of the facts forming the legal background in this aspect of the case should begin with Judge McMahon's Decision (Appendix 94-95) in which he stated in part:

> "It is clear, from the legislative history, that the Federal Tort Claims Act has the purpose 'of providing for more fair and equitable treatment of private individuals and claimants when they deal with the government or are involved in litigation with their government, S. Rept. No. 1327, 87th Cong. 2d Sess., 1966, U. S. Code Cong. and Avmin News, p. 2515. In light of this enlightened policy, a dismissal would result in an injustice. Plaintiffs would be forever barred from asserting this claim for relief because they failed to file administrative claims within two years of the accident. However, this failure was not the fault of the plaintiffs, as they

> had no indication that Hunt was a government employee acting within the scope of his employment, but was the fault of Hunt or his superiors for failing to follow the prescriptions of 28 U.S.C. §2679(c)."

This accident happened on November 8, 1972 and the Federal Government not only had the opportunity to investigate but did investigate the facts and circumstances of the accident. Consequently, there was no prejudice to the government in any way because of the failure of the plaintiffs to file an immediate administrative claim. In fact, it would appear that the government's investigation, was largely completed before any action was commenced by the plaintiffs in the Supreme Court of the State of New York on May 23, 1973. It must certainly be assumed that the government, in the course of its investigation, satisfied itself that Francis Hunt was acting at the time of the accident in the course of his employment for the United States of America. Consequently, the case was one which, from the government's point of view, involved the liability of the United States of America as a substitute for Francis Hunt with respect to any liability arising out of the accident. The government was also charged with knowledge that pursuant to U.S.C. 1346(b) and 2679, the injured parties had no claim against Francis Hunt, individually.

The plaintiffs' action against Francis Hunt individually, was begun because he was the owner and operator of one of the vehicles involved and there was no indication of liability on the part of any third person or organization.

The statute U.S.C. 2679(c) required Francis Hunt, upon receipt of the Summons and Complaint, to do an affirmative act, namely, to transmit the Summons and Complaint or a copy of it to his superior officers and to the department for which he worked. This should have been done within a few days after service was effected upon him. He gave

no such notice but he did notify his insurance carrier, the Travelers Insurance Company. That company undertook to represent him. Both Francis Hunt and the Travelers Insurance Company knew that the action involved $150,000, $140,000 more than the amount for which Francis Hunt was insured.

The Travelers Insurance Company referred the defense of Francis A. Hunt to the law firm of Hinman, Howard & Kattell, an established firm with long experience in insurance matters and in litigation. An Answer was filed on behalf of the defendant, Francis A. Hunt, consisting merely of denials and a crossclaim against the defendant, Ruth Semko. No affirmative or special defenses were pleaded. At this stage, the procedural rules of the Courts of New York State applied. Section 3018 of the Civil Practice Law & Rules provides as follows:

> "(a) Denials. A party shall deny those statements known or believed by him to be untrue. He shall specify those statements as to the truth of which he lacks knowledge or information sufficient to form a belief and this shall have the effect of a denial. All other statements of a pleading are deemed admitted, except that where no responsive pleading is permitted they are deemed denied or avoided.
>
> "(b) Affirmative defenses. A party shall plead all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading such as arbitration and award, collateral estoppel, discharge in bankruptcy, facts showing illegality either by statute or common law, fraud, infancy or other disability of the party defending, payment, release, *res judicata*, statute of frauds, or statute of limitation. The application of this subdivision shall not be confined to the instances enumerated."

Civil Practice Law & Rule 3211 provides in part as follows:

> "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> 2. the court has not jurisdiction of the subject matter of the cause of action; or
>
> 5. the cause of action may not be maintained because of the arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, *re judicata,* statute of limitations, or statute of frauds; or
>
> 8. the court has not jurisdiction of the person of the defendant; or
>
> 10. the court should not proceed in the absence of a person who should be a party.
>
> "(e) Number, time and waiver of objections; motion to plead over. At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading. A motion based upon a ground specified in paragraphs two, seven or ten of subdivision (a) may be made at any subsequent time or in a later pleading, if one is permitted. An objection based upon a ground specified in paragraphs eight or nine of subdivision (a) is waived if a party moves on any of the grounds set forth in subdivision (a) without raising such objection

or if, having made no objection under subdivision (a), he does not raise such objection in the responsive pleading."

The clear intent of the Civil Practice Law & Rules is to prevent surprise and require objections to jurisdiction or to the capacity of the plaintiff to sue the defendant to be raised by Motion or Answer. *Rivoli Trucking Corp. v. Amer. Export Lines,* 17 Misc. 2d 569 (1959); *Henning v. Ebersole, et al.,* 8 Misc. 2d 768 (1957). Objections that the Court had no jurisdiction of the cause of action and no jurisdiction over Francis Hunt because his liability had been assumed by the United States Government, and required to be raised by Motion or Answer and were not raised. While the case remained in the Supreme Court of the State of New York proceedings were subject to the laws of the State of New York and the parties were governed thereby. In the absence of any special defense set forth in the State Court and the absence of any intervention on the part of the United States Government, the plaintiffs were entitled to rely upon the regularity of the proceedings in the form in which they had been commenced.

Neither through counsel in the State Court nor through the agencies of the Federal Government were the plaintiffs ever made aware of the claim that Francis Hunt, at the time and place of the accident was acting in the course of his employment for the United States Government.

On its original Motion to Dismiss, the United States submitted an affidavit from one William J. Stokes, referring to records of the Research and Operations Division in the Office of the General Counsel, United States Department of Agriculture. Mr. Stokes identified certain records and stated that Mr. Hunt had not notified that office of the action until December 10, 1974 by a letter from Mr. Sommer (Appendix 18 and 19). He makes no reference to the

telegram sent by Mr. Sommer at Mr. Hunt's request, or to the earlier telephone call from Mr. Merwin Kaye of the Research & Operations Division in the Office of the General Counsel which requested Mr. Hunt specifically to call upon the government to defend him. The effect of this telephone call by Mr. Merwin Kaye and the telegram requesting defense by the government is established by a letter of December 10, 1974 from Mr. Hunt's insurance counsel, Theodore Sommer, to Kramer, Wales & McAvoy (Appendix 65, 66). This clearly indicates that the United States had knowledge of the action pending in the Courts in New York State against Mr. Hunt before the date indicated by Mr. Stokes. The government filed a Reply Brief on the Motion to Dismiss and never disputed the blunt statements contained in Mr. Sommer's letter as to the manner in which the request for representation by the United States Government originated. It is then uncontradicted that Mr. Merwin Kaye, acting for the Research and Operations Division of the Office of the General Counsel, after the two-year limitation had run, called Mr. Hunt, requesting that the government be brought into the case. Under these circumstances, the only reasonable inference is that the government knew long before December, 1974 of the existence and status of the action in the Supreme Court of New York State and failed and neglected to notify the United States Attorney in the Northern District of New York of that fact.

These are exceptional circumstances under which the United States Government must be held to have lost its right to assert against the plaintiffs either the failure to file an administrative claim or the defense of the statute of limitations. The case requires the application of the doctrine expressed by Judge Kaufman in the introductory paragraph of his Opinion in *Corniel-Rodriguez v. Im-*

migration and Naturalization Service, 532 F. 2d 301 (1976) which reads as follows:

> "It is, as Justice Cardozo stated long ago, a 'fundamental and unquestioned' principle of our jurisprudence that 'no one shall be permitted to * * * take advantage of his own wrong.' *R. H. Stearns Co. v. United States,* 291 U. S. 54, 61-62, 54 S. Ct. 325, 328, 78 L. Ed. 647, 653 (1934)."

In that case, this Court held that the government was estopped from deporting a person who entered the country under an immigrant visa because of her marriage before entering the country. The estoppel was based upon the failure of an official of the United States Government to perform an act required to be performed by him under the law and rules of the United States. A subsequent decision of this Court in *Lillian Goldberg, Appellant v. Casper Weinberger, Secretary of Health, Education & Welfare* (pp. 1a-7a of the Addendum to the Appellant's Brief), refers to *Corniel-Rodriguez,* the case just cited, and specifically points out the difference between a case in which there has been "noncompliance with an affirmatively required procedure" (Appellant's Brief 7a, Note 5), and a case where a government employee has expressed an erroneous opinion as to the law.

This is precisely the case before this Court. For a period in excess of 17 months there has been a failure on the part of the United States Government to perform the acts required to assert jurisdiction of the United States over a case commenced against its employee in a State Court. Not only has there been such noncompliance, but the record fully justifies the conclusion that the noncompliance was wilful and the result of "sharp practice on the part of the government" as Judge McMahon and Judge Port both indicated in their respective Opinions.

Other Federal Courts have indicated agreement with the principal asserted here. In *Massaglia v. C.I.R.*, 286 F. 2d 258 (10th C.C.A.) at page 262, the Court said:

> "The very nature of government operations requires us to apply the principles of estoppel to its conduct with circumspection. See *Vestal v. Commissioner*, 80 U. S. App. D. C. 624; 152 F. 2d 132; *Guenzel's Estate v. Commissioner*, 8 Cir. 258 F. 2d 248. At the same time we will not allow the government to deal dishonorably or capriciously with its citizens. It must not play in ignoble part or do a shabby thing. See *United States v. Heath*, 9 Cir. 260 F. 2d 623."

In *United Fruit Company v. United States*, 168 F. Supp. 549 (1958), the Court said at page 552:

> "Furthermore, as we pointed out in *Continental Casualty Co. v. United States*, Ct. Cl. 156 F. Supp. 942, if it be held that the admiralty courts have such jurisdiction, a large part of plaintiff's claim would be barred by the two year statute of limitations applicable to suits under the Suits in Admiralty Act. Plaintiff quite rightly has assumed that its suit could be brought within the six-year period of limitation applicable to suits in this Court. If it now be held that such suits must be brought in the Admiralty Court, then much of plaintiff's claim is barred by the statute of limitations. In view of the long acquiescence by the government in the bringing of such suits in this court, it cannot now in good conscience assert that such suit must be brought within the two-year period applicable under the Suites in Admiralty Act."

In the case of *Sulo Kangas v. United States of America and Armin Reinard Steinhaus* (Opinion pp. 11a to 15a of the Appellant's Brief), the Court while denying estoppel in that case indicated that under other circumstances an estoppel might exist. That case, like others cited by the appellant, is not in the least analogous to the present case.

There are no claims filed and the action in the State Court was begun two years after the accident when the time for filing claims and the statute of limitations both had expired or were about to expire. The government had no opportunity to assert its authority in any way before both limitations had expired.

The appellant has cited many cases in support of its claim that the rule which must be applied in this case is well established and contrary to the decisions of the lower courts in this case. It is submitted that none of these cases apply to the factual situation in this case. There is no case in which the United States Government did not act to remove the case begun in the State Courts within a few weeks after the action in the State Court had been commenced. In all of these cases, there was full compliance by the United States Government, with the obligations imposed upon it and its employees under the U. S. Code §2679(c).

In *Driggers v. United States,* 309 F. Supp. 1377 (District Court S. Georgia, 1970), the accident happened on April 21, 1969. Action was begun in the State Court on April 23, 1969. The United States Attorney moved the case to Federal Court so rapidly that the Decision was handed down on March 19, 1970, less than one year after the accident and well within the two year period for filing claims, if that were to apply.

Beavers v. U. S., 291 F. Supp. 856, was an action directly against the United States in which no administrative claim had been filed and the question of removal from State Court was not involved. However, even in that case the cause of action arose on June 16, 1967 and the dismissal occurred on October 30, 1968 on the ground that the action was premature. There remained ample time for filing a claim within the two year period.

In *Staley v. United States,* 306 F. Supp. 521, the claim is directly against the United States. The cause of action accrued on October 3, 1968 and the Decision dismissing the claim as premature for failure to file an administrative claim was rendered in 1969, again well within the two year period for the filing of the administrative claim.

In *Meeker v. U. S.,* 435 F. 2d 1219 (8 Cir. 1970), suit in the State Court was instituted on December 17, 1969 and on December 31, 1969 the United States Attorney had the case removed to Federal Court. Plaintiff was aware that the Federal Government was involved because the accident involved a collision with a postal truck. Suit was begun in the State Court one day short of two years following the accident. Because the State Court action was begun one day short of the two-year statute of limitations set forth in U.S.C. 2401, and the two-year period for filing claims set forth in U.S.C. 2675, there was no time within the statute within which the United States Court could act effectively. It will be noted that the United States acted within two weeks after the institution of the action in the State Court. Even then the Court dismissed the action as premature because no administrative claim had been filed and did not pass on the application of U.S.C. Title 28, Section 2401.

In *Carr v. United States,* 422 F. 2d 1007, an accident happened in December (on December 8, 1965) involving a collision between two cars, each operated by Government employees, obviously in the course of their employment. The action was commenced in the State Court on March 6, 1968, over two years after the accident. It was removed to Federal Court and dismissed. In this case the accident involved two Federal employees, each of whom was engaged in the course of his employment and known to be a Federal Employee engaged in such employment. The action was instituted after the two-

year statute had expired and in the State Court solely in an effort to avoid the restriction in the recovery of the plaintiff of that to which he was entitled under the Federal Employee's Compensation Act. The claim against the United States was lost because of the availability of relief under the Federal Employee's Compensation Act and there could have been under no circumstance a valid claim against the United States if the defendant employee was acting within the scope of his employment. The Statute of Limitations problem was purely incidental.

In *Hoch v. Carter*, 242 F. Supp. 863 (S. D. N. Y. 1965), the plaintiff infant brought an action in the State Court against the owner of a school bus which was involved in an accident. There was no proceeding in any court against the Government or its employee until more than two years after the accident. At that time the plaintiff learned that a United States Post Office truck was involved in the accident and made the driver of that truck an additional defendant in the action in the State Court, this action being begun more than two years after the initial accident. At no time was there any administrative claim filed.

The case was determined principally on the question whether infancy was a disability under the circumstances which would toll the running of the statute of limitations in the action against the government, and the Court held that the statute was not tolled by infancy, citing the Federal Statute. It will be noted that from the inception of the action against the Government employee the responsibility of the Government was apparent from the identity of the vehicle involved in the accident and the action against the employee was purely an effort to avoid the effect of the statute of limitations.

In *Perez v. U. S.*, 218 F. Supp. 571 (1963 S. D. N. Y.), there was a collision between the plaintiff's car and a postal truck driven by the individual defendant. The action was brought in United States District Court initially against both the United States and the individual employee. The action was dismissed against the employee on the ground that the United States had assumed complete responsibility for any damages and that that remedy was exclusive.

Similar in effect are *Noga v. U. S.*, 411 F. 2d 943 and *Gustafson v. Peck*, 216 F. Supp. 370.

In the following cases an action was brought directly against the United States and they merely hold that the filing of an administrative claim is necessary prior to the institution of an action against the United States. The question of the statute of limitations was not involved in any of these cases. *Peterson v. United States*, 428 F. 2d (8th Circ. 1970); *Bialowas v. United States*, 443 F. 2d 1047 (1971); *Avril v. United States*, 461 F. 2d 1090 (1972) and *Bernard v. U. S. Lines, Incorporated, etc.*, 475 F. 2d 1134 (1973); *Gunstream v. U. S.*, 307 F. Supp. 366 (C. D. Cal. 1969).

In *Baker v. United States of America*, 341 F. Supp. 494(d) (Md., 1972), affd. Percuriam C. A. 4 No. 72-1708 Nov. 30, 1972, p. 8a of the Addendum to the Appellant's Brief, the accident happened on June 15, 1955. Action was first begun in the City Court of Baltimore in June of 1968 after all the statutes of limitations in the United States Code had expired and just as the Maryland statute of limitations was about to expire. This action was brought more than two years after the accident and, hence, after the expiration of the limitations set forth in U.S.C. 2401. The case was removed to Federal Court and dismissed because no action was brought within the two-year limitation set forth in 28 U.S.C. 2401.

In *Sulo v. Kangas, plaintiff v. United States of America and Armin Reinhard Steinhaus,* defendants (Addendum to Plaintiff's Brief 11a-15a), an accident happened on November 15, 1972, an action was begun in the State Court by service of a Summons and Complaint upon the defendant Steinhaus on or about November 15, 1974, two years after the occurrence of the accident. This was another case in which the action in the State Court was started either on the day or the day after the statute of limitations had run on the claim against the United States and on or about the date that the time for filing claims against the United States expired. Again, there was no time within the statute of limitations within which the United States Government could assert its jurisdiction and move the cases into the United States Court.

In *John J. Elter v. United States of America* (Addendum to Appellant's Brief 16a-20a) an accident happened on May 22, 1970. Action was brought by the plaintiff against Marlin LeFever and his wife, Martha LeFever on April 25, 1974 in a Court of Common Pleas in Butler County, Pa. Within two months and on June 12, 1974, the United States was substituted as the defendant in the action in the place of Martha LeFever. The Motion of the United States to dismiss the Complaint was granted. Here, again, there is a case in which there was no action against the government employee in any Court until nearly four years after the accident and nearly two years after the expiration of the Federal statute of limitations, both as to the filing of claim and the commencement of actions.

In *Jeanette Grix, et al. v. United States of America* (Addendum to Appellant's Brief 21a-23a), an accident giving rise to the action occurred on March 30, 1972. The action was brought directly against the United States of America. No administrative claim was ever

filed and a Complaint had been filed in the District Court on March 8, 1974, shortly before the statute of limitations would run and this was dismissed on July 26, 1974. A new Complaint was filed on October 7, 1974 after the statute of limitations had run.

It will be noted that the action was directly against the United States of America and that the applicable sections of the United States Code applied fully to it. There was no question of removal of an action begun in the State Court.

In *Melo v. United States,* 505 F. 2d 1026, the accident happened on November 1, 1971. On November 23, 1971, the plaintiff's attorney wrote to the Post Office Department indicating his belief that the Post Office was responsible and did not claim specific damages. The Post Office returned forms to be completed to make claim saying the forms had to be filled out and filed. The forms were never filed. Then, on October 12, 1973, almost two years after the accident, the action was brought against the Federal employee Dyer in the State Court, indivdually. The case was subsequently removed on Motion and the United States substituted as defendant and the action was dismissed for failure to file a claim. This was a clear case in which the plaintiff and his counsel knew they were dealing with the government and failed in spite of government invitation for the furnishing of forms to file a claim. It has no relevance to the present case.

In *Binn v. United States,* 389 F. Supp. 988, the accident happened on August 3, 1971. Actions were begun in the United States District Court against the United States Government and in the Circuit Court of Racine, Wisconsin against a government employee named Williams, on the same day, August 2, 1974, practically three years after the accident. The actions were consolidated in the Federal Court and were dismissed. This is another case in which

no action was begun in any Court or any claim filed within the two-year statutory limitation set up by U.S.C. 2401, no failure on the part of the government to act and no proceeding within the two-year statutory period.

If the provisions of U.S.C. 1346(2) (b), 2401, 2674, 2675 and 2679(b) are intended to apply under all circumstances and without reference to other remedial provisions of the same statute, there was no requirement or purpose for the Congress to enact U. S. Code 2679(c), (d), (e). The effect of these statutes as interpreted would have been to require any action involving negligence on the part of a government employee in the course of his employment to be brought initially in the United States District Court following the filing of an administrative claim. There would be no legal effect accomplished by continuing the provision regarding the removal of actions brought in State Court against government employees to the United States District Court. Those actions would be without any basis and jurisdiction in any event. Obviously, the Congress did not intend to require every person injured as the result of someone else's negligence to file a tort claim against the Federal Government or to lose the right to recover for such injuries if at some later date the Federal Government asserted that such employee was in fact a United States Government employee engaged in the course of his employment. In fact, without some provision recognizing the potential litigation arising in the State Courts the statute might be unconstitutional.

It is obvious that Congress had no such intention. Its purpose was to afford protection to the government employees in the course of their employment and to provide a means by which proper monetary damages could be paid to those injured by the negligence of government employees in the course of their employment. It was not intended, and it should not be construed, as a means

by which both the negligent employee and the government would avoid just liabilities for injuries and death by concealing facts and hiding behind statutes, the application of which, in the normal course of events, would be unknown to the injured parties. For this reason, U.S.C. 2679 (c) (d) (e) imposed upon the United States and its employees and agencies the obligation to be informed with respect to any proceedings against government employees in the State Courts and to proceed promptly to assert the interest of the United States and to remove such cases to the jurisdiction of the Federal District Courts. In the present case where action against the Federal employee was instituted in the State Court approximately six months after the accident the statute provides for prompt notice to a plaintiff in a State Court action of the government's assertion of its interest in protecting its employee and itself from liability. As to actions commenced within such time after the occurrence of an accident and even considerably later the U. S. Code provides a straight-forward and direct means of asserting the government's jurisdiction without any way prejudicing the right of the injured party to file an administrative claim within two years as required by U.S.C. 2675 and 2401(b).

In the present case, plaintiff's counsel acquired knowledge that Francis Hunt was an employee of the United States Government at an Examination Before Trial in which Mr. Hunt testified that he had completed work for that day at four o'clock and was on his way to his residence. This established that he was a government employee. However, the testimony would indicate reasonably that he had finished work and was not in the course of his employment at the time of the accident. Plaintiff's counsel accepted this testimony. However, there was much more than merely this testimony to indicate to the plaintiff's counsel that Francis Hunt was not, as a matter of fact, in the course of his employment at

the time of the accident. The action in the State Court had been in existence for nearly a year. No Motion had been made by the United States Attorney to substitute the United States Government as a defendant to assert its interest in the case. No defense asserting the employment of Francis Hunt by the United States Government in the course of his employment and the consequent absence of jurisdiction in the State Court had been alleged by the eminent counsel representing Francis Hunt in the action in Supreme Court.

It is submitted that the plaintiffs' counsel was fully justified in concluding under these circumstances that the only remedy of the plaintiffs was against Francis Hunt individually. Only the total failure of the government to comply with its own statutes, coupled with the deceptive tactics of the insurance carrier of Francis Hunt deprived the plaintiffs' counsel of knowledge of the existence of a claim against the United States requiring the filing of an administrative claim and pursuit of an action directly in the Courts of the United States. Under these circumstances, citations of general principles to the effect that the United States is not subject to the defense of estoppel or waiver lose their relevance and the rights of the plaintiffs are not lost. *Corniel-Rodriquez v. Immigration and Naturalization Service,* 532 F. 2d 301 (2nd Circuit); *Lu You Fee v. Dulles,* 236 F. 2d 885, 887; *Podea v. Atcheson,* 179 F. 2d 306; *Massaglia v. C.I.R.,* 286 F. 2d 258 (10th CCA), *supra; United Fruit Company v. United States,* 168 F. Supp. 549; *Moser v. United States,* 341 U. S. 41 (1959), see U. of Colorado Law Review Vol. 46 pp. 433, *et seq.*; 551 U. Chicago Law Review 680 (1954). The language of the Court in *Lu You Fee v. Dulles,* 236 F. 2d 885-887 is applicable here. There the Court said at p. 887 of 236 F. 2d:

"Certainly the government should not be heard to contend that a plaintiff had been deprived of his citizenship because of the failure of the plaintiff to do something which the officials of the government have carelessly or willfully prevented his doing."

CONCLUSION.

The judgment should be affirmed.

Respectfully submitted,

DONALD W. KRAMER,
KRAMER, WALES & MCAVOY,
Attorneys for Respondents,
Office & P. O. Address
59-61 Court St.
Binghamton, N. Y. 13901
Telephone: (607) 723-6321

Certificate of Service.

I hereby certify that on this day of July, 1977 I served the foregoing Brief and Appendix upon counsel for all parties by causing copies to be mailed postage prepaid to

Eloise E. Davies, Attorney,
Appellate Section, Civil Division
Department of Justice
Washington, D. C. 20530

Robert C. Powers, Esq.
46 Vestal Avenue
Binghamton, N. Y. 13903

DONALD W. KRAMER
Attorney

Appendix.

UNITED STATES DISTRICT COURT,

NORTHERN DISTRICT OF NEW YORK.

HELEN D. KELLEY and JOHN KELLEY,

Plaintiffs,

against

THE UNITED STATES OF AMERICA and RUTH SEMKO,

Defendants.

75-CV-62

Decision of Hon. Edmund Port, in the above-entitled matter given on the 4th day of June 1976 at the Federal Building, Auburn, New York.

Appearances:

Kramer, Wales & McAvoy, Esqs., Attorneys for the plaintiffs, By: Donald Kramer and Brian Wright, Esqs., of counsel.

Hinman, Howard & Kattell, Esqs., Attorneys for defendant, U. S. A., By: Theodore Sommer, Esq., of counsel.

Hon. James M. Sullivan, Jr., United States Attorney, for Defendant U. S. A. By: Joseph Matthews, Assistant United States Attorney.

Robert C. Powers, Esq., Attorney for Defendant, Semko.

The Court: Gentlemen, as I indicated to you at the close of the evidence, I wanted to have an opportunity to examine the exhibits and to review my notes. There

were practically no legal problems in connection with the case. It was a garden variety automobile pedestrian negligence action. The only legal problem that I can see in the case is the one that was disposed of by Judge MacMahon. Having reviewed the matter, I am prepared now to and will dictate my findings of fact and conclusions on the record.

This is an action for damages brought by Helen Kelley and John Kelley. It is Helen D. Kelley and John E. Kelley against the United States and Ruth Semko for damages and injuries sustained by Helen Kelley as a result of an accident occurring on November 8, 1972 at about 2:40 p.m. on Upper Park Avenue in the Town of Binghamton in Broome County, New York, in the vicinity of the Vosburgh residence. The particular time was described as being about dusk. The plaintiffs are husband and wife. The defendant is the United States of America, and Ruth Semko is the owner and operator of one of the automobiles involved in this particular incident.

Helen Kelley was 59 years plus at the time of the accident, married and living with her husband, John E. Kelley, for many years, having raised a family of three children to adulthood.

The United States of America is named as a defendant as a result of the operator of a second vehicle involved in the vicinity, one Francis Hunt who was an employee of the United States Department of Agriculture at the time of the accident, and by admission of the defendant, the United States, was acting within the scope of his employment at the time.

The suit was initially instituted against the Defendant Semko and Francis Hunt in Broome County. It was removed from Broome County on the certification of the United States pursuant to the provisions of the Federal Tort Claims Statute. A motion was made to substitute the United States after the removal of the action to this

court in place of the Defendant Hunt. That motion was granted by Judge MacMahon. At the same time a motion was made to dismiss the action against the United States on the ground that the plaintiff has failed to timely file an administrative claim. Judge MacMahon, in a written, well-rounded opinion, granted, of course, the motion to substitute the United States in place of Hunt as a defendant, and denied the motion to dismiss.

Upper Park Avenue at all the times that we are concerned with was a road running generally in a northerly and southerly direction in the Town of Binghamton, between the City of Binghamton and Hollyton. The Vosburgh residence is situated on Upper Park Avenue at a point where Upper Park Avenue ascends and forms a crest of a grade in front of the Vosburg premises. The road approaching the Vosburgh residence from the north is substantially level and straight. About opposite the Vosburgh driveway and proceeding to the south, the road takes a decline, the degree of which was not brought out on the trial. The pictures make it difficult to determine the degree because of prospectives.

As one approaches the road opposite the Vosburgh residence and the crest of the hill, the line of sight is limited, but it is possible to see a vehicle approaching the crest in either direction for a short distance prior to reaching the crest. Upper Park Avenue is a macadam two-lane highway approximately 16 feet wide at the time of the accident without markings of any kind. There was neither a center line or demarcation lines for the edge of the road. A few feet from the north of the north edge of the Vosburgh driveway leading out to Upper Park Avenue, there was a mailbox. At the time I mentioned, Francis Hunt, the government employee, was driving his car in a northerly direction. The Defendant Semko was driving her car in a southerly direction. As a result of the negligence of each defendant, each one

on approaching the other, was partially to the left of the center line of the highway. Approaching each other in that position, they each attempted to take some diversionary action. Mrs. Semko drove her car to her right off onto the shoulder of the road and then back onto the road. Mr. Hunt veered his car to the right. As a result of the action, his car—incidentally, it was raining at the time, the road was wet. His car went into a skid, fishtailing as it proceeded north past the crest of the hill, and in the course of the skidding of his car, it, at one point, reached a position at right angles to the road. The front part of his car being on the paved portion of the road and the rear portion on the shoulder of the road ultimately. His car crossed over to the other side of the road as a result of a counterclockwise motion of his car, so that it wound up on the west side of the road facing in a southerly direction, having negotiated a 180-degree turn. In the course of this skid, the plaintiff was struck by some part of the rear of the Hunt car. The plaintiff's only recollection of the accident was a recollection of seeing the grille of a car, which I found to be that of Hunt, approaching her. She attempted to move to her left but was obstructed by a bank in the road and was struck by the car before she could manage to get out of its path.

Prior to the accident, the plaintiff had been taking a walk and was at a point approximately 130 feet north of the mailbox that I have referred to on the shoulder of the road, and on the easterly side of the road walking south. So that she was walking in accordance with the mandate of the Vehicle and Traffic Law of the State of New York, on the shoulder, facing oncoming traffic.

Each defendant was negligent in the operation of their respective vehicles under all the facts and circumstances existing at the time. And the negligence of the defendants was the proximate cause of the plaintiff's injuries.

That is, their combined negligence, or the negligence of each of them was a substantial factor in bringing about the injuries to the plaintiff. The accident and injuries to the plaintiff resulting therefrom were caused solely by the negligence of the defendants and was not caused or contributed to in any way by any negligence on the part of the plaintiff, Helen Kelley.

In weighing the negligence contributing to the accident of each defendant vis-à-vis the other. I find that they contributed equally, or their negligence contributed equally to the accident and to the plaintiff's injuries.

As I indicated earlier, the plaintiff, Helen Kelley, is a very nice looking, slim woman at the present time who, at the time of the accident, was upwards of 59 years of age with a stipulated life expectancy of 13.79 years. Mr. and Mrs. Kelley's family consisted of three children, all of whom at the time of the accident were grown and away from the family home. With her release from the obligations of raising a family, Mrs. Kelley enlarged her activities beyond those that she had prior to the accident of attending to her family and her household, and in addition to cleaning and taking care of her house and cooking and generally operating the household, and engaging in the usual normal social other activities of husband and wife, she now undertook rather extensive athletic activities for a woman of her age. She became a tennis player, joined a tennis club, played tennis frequently, engaged in club and league tournaments. She swam. She and her husband rollerskated together, and she made it a practice to take long walks daily, or nearly daily.

After the accident, by reason of the injuries she sustained, these athletic activities, per force were limited. Her tennis was resumed after a period of recovery, convalescence and rehabilitation on a limited scale and with a more moderate and less competitive sort of play. She no longer engaged in tournament or competitive activity.

She did practically no swimming, although swimming was one of her activities prior to the accident. She resumed gardening on a limited basis, and because of the difficulty in kneeling, and she found that even in church going, it was necessary that she have an extra pillow for kneeling purposes. She suffered, still suffers pain on sitting or standing still for any considerable period of time as a result of the stiffening of the knee and the joints. Her walks, although she still engages in them, are now limited to her driveway and are no longer the type of walk over the country roads and up and down the hills that she did before the accident. She has difficulty in walking up and down stairs.

As a result of the accident, the plaintiff suffered extensive injuries to both legs. She suffered an open comminuted fracture of her right femur. The thighbone was fractured severely with the bone fragmented and some bone penetrating through the skin. She sustained a serious injury to her left knee. Several ligaments were ruptured, and the kneecaps were ruptured. The fibula was broken away from the knee requiring that the two parts be wired together.

After the accident, the plaintiff was taken from the scene of the accident to a hospital in Binghamton by ambulance. She was given emergency treatment there and was placed in bed until November 13th, a matter of some five or six days before surgery was undertaken. If I recall correctly, the surgery was delayed because of the apparent worry about possible infection. The left knee was then repaired by surgical means. The cartilage was removed, torn ligaments were sewn, but not all the ligaments could be repaired. A pin was placed in the plaintiff's right thigh in order to place her right leg in traction so the traction rather than an operation could be used for positioning the bones in her right leg.

Following the surgery, the plaintiff's left leg—when I refer to plaintiff here, I think it is obvious that I am

referring to the plaintiff, Helen Kelley. Her left leg was placed in a full-leg cast from the foot to the hip so that just her toes were exposed. This cast was not removed until January 3rd, 1973. That is, it was on from November 11th, a period of from 55, 56 days. Her right leg, in an effort to position the fracture in the femur, was placed in a cradle of sorts with weights attached so that it would be in traction, and traction was applied until February 9th, a period of some 90 or 94 days. After removing the traction, the right leg was still maintained in this suspended position in the cradle, but at this period it was not constantly in that position, but it was taken out for her to go to the physiotherapy department. Earlier she was taken out on a stretcher with the traction still applied.

Physiotherapy was commenced as soon as the cast was removed, and I believe that there were some efforts at exercise, either passive or active, before that time. As a result of one leg being in traction and the other leg being in this full-length cast, the joints had stiffened and the muscles, of course, had naturally deterioriated. She remained in the hospital undergoing the usual treatment, including physical therapy, until March 24th, 1973 when she was released. Her hospitalization covered a period of about four and a half months.

During the period of hospitalization, the plaintiff suffered considerable pain. She was administered Demerol and other pain-relieving medications as well as tranquilizers such as Valium. She had pains in her back as a result of being required to maintain a position of practically complete immobility in her back for a long period during the period the traction was applied and the leg cast was on. Towards the end of her hospitalization, she suffered a period of anxiety and depression, although throughout most of her hospitalization, she demonstrated great courage and determination to effect a recovery and a resumption of normal activities as far as

could possibly be achieved. For the latter part of her hospitalization, she was instructed in the use of a walker. She used a walker, she used a wheelchair, and subsequently, crutches over a long period of time. She graduated from the wheelchair to the walker to the crutches, to one crutch, to no aid. Her physical therapy was continued until December 1973 and her checkups by the attending physician continued for another year. Her exercise program has continued to date. Her efforts have been conscientious in connection with exercise. A failure to exercise would, I am sure, result in a deterioration of her condition. She scrupulously adheres to a regimen of exercise to maintain her limbs as good condition as is possible. In fact, I think that counsel all made reference to the fine recovery that this plaintiff effected and were quite extravagant in their praise of her determination and courage in connection with her recovery.

There was no medical evidence offered to dispute that offered by the plaintiff. As a result of the accident, she suffered permanent injuries to her right leg. Her right leg is one-half to three-quarters of an inch shorter than it was. Her right thigh muscles have atrophy to some extent. Her right thigh is now one-half inch less in circumference than her left thigh. She has a small degree of rotation, deformity in the right thigh, and she has lost some flexion in the right knee. Her left knee, of course, suffered the most severe injury. A ligament was ruptured, not repaired, and the ligament that was involved was the ligament that stabilizes the knee. She now must rely on other ligaments and muscles to perform this stabilizing function instead of the ligaments supplied by nature for this purpose. As a result, there is increased instability in the knee, and she has difficulty with that knee. The range of motion is limited. She is now suffering from traumatic arthritis in both knees which, of course, is permanent and will worsen with time and age. She has a grating sensation with the use of her left knee.

John Kelley, the plaintiff, Helen Kelley's husband, incurred reasonable medical expenses in connection with the care and treatment of his wife's injuries in the total amount of $11,680.75. During his wife's hospitalization, he visited her on a daily basis. Since his wife prepared the meals normally, he was obliged to take his meals, particularly his dinner, out every evening until her return to the family home. The companionship, of course, society of his wife, the inability to engage in their normal activities that they previously enjoyed as husband and wife, were denied them. The plaintiff, John Kelley, was obliged to drive his wife to and from the therapy sessions for several months at her return home. In short, during the period of his wife's hospitalization, he was wholly, and during the subsequent period of home convalescence and rehabilitation, he was partially deprived of his wife's services, society and marital relationship that they enjoyed prior to the accident.

I find that the plaintiff, Helen Kelley, suffered damages in the total amount of $50,000. I find that the plaintiff, John Kelley, sustained damages in the total amount of $15,000.

I conclude that this Court has jurisdiction of the parties and the subject matter of this action, that the plaintiffs have complied with all jurisdictional requisites to a suit under the Federal Tort Claims Act except as to the filing of a timely administrative claim. This, however, does not make the claim of the plaintiff dismissible pursuant to the decision of Honorable Lloyd MacMahon in this action dated September 18th, 1975. In fact, in my mind, it raises an inquiry as to whether if the claim, by reason of what Judge MacMahon referred to as "the govern- fact dismissible if it couldn't and perhaps shouldn't have ment's inexcusable delay, [sic] not sharp practice" was in been, if that were the case, remanded to the state court for prosecution as it had originally been commenced. It is a question that is not before me at this time, and I don't think it can arise at this time.

I further conclude that Francis Hunt, the government employee was acting within the scope of his employment with the United States at the time of the accident involved, that he negligently operated his motor vehicle at the time in question, in that he operated his vehicle so that at least part of it was to the left of the center line of the highway, and under all the conditions existing at the time, was driving at a speed in excess of that reasonably prudent.

The defendant, Ruth Semko, likewise negligently operated her motor vehicle at the time in question for the same reasons assigned to Francis Hunt.

I find that neither the Plaintiff Helen D. Kelley or the Plaintiff John E. Kelley were negligent in any manner whatsoever or were guilty of contributory negligence. The accident, with the resulting injuries, were proximately caused by the negligence of both defendants. Each defendant contributed to their respective negligence equally to the accident.

Judgment should be entered in favor of each plaintiff against both the Defendant United States of America and the Defendant Ruth Semko, apportioning liability as between them in accordance herewith, the judgment in favor of the plaintiff to be entered against both; the formal judgment to be on consent were settled before me on three day's notice at Auburn, New York.

Now, if I accidentally, or through error, made any findings here for which there is no support in the record, you may call it to my attention.

Mr. Kramer: Your Honor, I have just one thing. I think in referring to the injury to Mrs. Kelley's leg, you referred to the muscles in the right leg as having atrophied, and I think Dr. Blauvelt's testimony was that it was the muscles in the left leg above the knee which had showed the signs of atrophy.

The Court: Well, if I did that, the record may stand corrected.

Mr. Kramer: Thank you.

The Court: Sometimes it is difficult not to confuse left and right and north and south.

Mr. Kramer: I do it every day.

The Court: Well, I am talking off the top of my head from sparse notes.

Mr. Sommer: Your Honor, I suspect there is only one area. I think you indicated that the road approaching from the north is substantially level and straight, and I am wondering if the testimony didn't reflect that with respect to the road approaching from the south.

The Court: Hunt was going up the hill. Semko was approaching the crest of the hill to decline. Hunt was ascending.

Mr. Sommer: All right.

The Court: Semko came off the level to go down. Hunt came up the hill to reach the level. I got that picture in my mind right.

All right, gentlemen. Entry on a judgment or I will sign it.

All exhibits may be returned to the parties supplying them with the understanding that they will be produced if needed for any other proceeding in connection with this case.

Certification.

I, GEORGE P. MCGLOINE, Shorthand Reporter and Notary Public do hereby certify that the foregoing transcript in the heading hereof is complete and accurate to the best of my knowledge and belief.

GEORGE P. McGLOINE

Dated: June 1977
Albany, New York

THE REPORTER COMPANY, INC.

Case and Brief Printing of all Kinds

Capacity—3000 Pages a Week

Phone 607-865-4131

181 Delaware Street

Walton, New York 13856

STATE OF NEW YORK, :
COUNTY OF DELAWARE, : SS:

I, William Finch , being duly sworn do depose and say: that I am over the age of twenty-one years and employed by The Reporter Company, Inc., Printers at Walton, New York.

That on the 12th day of July , 19 77, at the request of Kramer, Wales & McAvoy, Attorneys at Law,

I served six copies of a Brief entitled "Helen D. Kelley and John E. Kelley vs. United States of America and Ruth Semko" as follows:

3 to: Eloise E. Davis, Appellate Section, Department of Justice,

3 to: Robert C. Powers, Attorney at Law,

by depositing said six copies in postpaid wrapper at 4 p. m. on this day, in the United States Postoffice at Walton, New York, addressed to the above

Eloise E. Davis, Appellate Section, Department of Justice, Washington, D. C. 20530

Robert C. Powers, 46 Vestal Avenue, Binghamton, New York 13903

and that there are a regularly established mail route between Washington, D. C. and Walton, New York. Binghamton, New York

William Finch

Sworn to before me
this 12th day of July , 1977.

Joan W. Clapperton
Notary Public

JOAN W. CLAPPERTON
NOTARY PUBLIC
DEL. CO., STATE OF NEW YORK
COMMISSION EXPIRES MAR. 30, 1978